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 7 GROUP, INC., f/k/a DRUGMAX, INC., a Nevada corporation and
 corporation

8
 9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA
 11 OAKLAND DIVISION

12 MCKESSON CORPORATION, a Delaware
 corporation,

13 Plaintiff,
 v.

14 FAMILYMEDS GROUP, INC., f/k/a
 15 DRUGMAX, INC., a Nevada corporation,

16 Defendant.

17 FAMILYMEDS GROUP, INC., f/k/a
 18 DRUGMAX, INC., a Nevada corporation,

19 Counterclaimant,
 v.

20 MCKESSON CORPORATION, a Delaware
 corporation,

21 Counterdefendant.

22 FAMILYMEDS, INC., a Connecticut
 corporation,

23 Cross-Complainant,

24 v.

25 MCKESSON CORPORATION, a Delaware
 corporation,

26 Cross-Defendant.

11 CASE NO. CV07-5715 WDB

12 **DECLARATION OF MATTHEW S.
 13 KENEFICK AND REQUEST FOR
 14 JUDICIAL NOTICE IN SUPPORT OF
 15 MOTION FOR ORDER GRANTING
 16 FAMILYMEDS, INC. LEAVE TO DISMISS
 17 CROSS-COMPLAINT WITHOUT
 18 PREJUDICE**

19 **FRCP 41(a)(2)**

20 **Accompanying papers:** Notice and
 Motion/Memorandum of Points and Authorities;
 and (Proposed) Order

21 Time: August 20, 2008
 Date: 1:30 p.m.
 Place: Ctrm. 4
 1301 Clay St., 3d Floor
 Oakland, CA
 Judge: The Hon. Wayne D. Brazil

22 Complaint filed: Nov. 9, 2007
 Counterclaim filed: Dec. 17, 2007
 Cross-Complaint Filed: Dec. 17, 2007
 Trial date: none set

1 I, Matthew S. Kenefick, declare:

2 1. I am an attorney at law duly licensed to practice before all the Courts of the state of
3 California, as well as all of the United States District Courts located within the state of California,
4 and am an attorney with Jeffer, Mangels, Butler & Marmaro LLP ("JMBM"), attorneys of record
5 for Defendant and Counterclaimant Familiy whole Group, Inc., f/k/a Drugmax, Inc., a Nevada
6 corporation ("FM Group") and Cross-Complainant Familiy whole, Inc., a Connecticut corporation
7 ("FM Inc.") (collectively, "Familiy whole"). I have personal knowledge of the facts set forth in this
8 declaration and could competently testify to each of the facts if called upon to do so. My
9 knowledge of the facts set forth in this declaration arises from the fact that at all applicable times,
10 either I or one of my colleagues at JMBM have been one of the attorneys primarily responsible for
11 the litigation of the within action.

12 2. On November 9, 2007, McKesson filed its Complaint for Breach of Contract against
13 Familiy whole Group (the "Complaint") (the "First Action"). Attached hereto as Exhibit 1 is a true
14 and correct copy of the Complaint, of which, pursuant to Federal Rule of Evidence 201,
15 Familiy whole respectfully requests the Court take judicial notice.

16 3. On December 17, 2007, Familiy whole filed their Counterclaim for Specific
17 Performance of Contract and Accounting; Cross-Complaint for Accounting seeking an accounting
18 under contract and in equity (the "Counterclaim"). Attached hereto as Exhibit 2 is a true and
19 correct copy of the Counterclaim, of which, pursuant to Federal Rule of Evidence 201, Familiy whole
20 respectfully requests the Court take judicial notice.

21 4. On January 14, 2008, McKesson filed its Motion to Dismiss Counterclaim for
22 Specific Performance of Contract and Accounting and Cross-Complaint for Accounting (the
23 "Motion to Dismiss"). Attached hereto collectively as Exhibit 3 are true and correct copies of the
24 Motion to Dismiss and McKesson's Reply in support thereof, of which, pursuant to Federal Rule of
25 Evidence 201, Familiy whole respectfully requests the Court take judicial notice.

26 5. On May 5, 2008, the Court heard and denied McKesson's Motion to Dismiss without
27 prejudice, directing FM Inc. to either file a motion to join the First Action or to re-file its claims in a
28 separate lawsuit (the "May 5 Order"). Attached hereto as Exhibit 4 is a true and correct copy of

1 the May 5 Order, of which, pursuant to Federal Rule of Evidence 201, Familiy whole respectfully
2 requests the Court take judicial notice.

3 6. On June 4, 2008, McKesson filed its Motion for Summary Judgment (the "MSJ").
4 Attached hereto as **Exhibit 5** is a true and correct copy of McKesson's Notice of Motion; Motion for
5 Summary Judgment or, in the Alternative, Summary Adjudication by McKesson Corporation; and
6 Memorandum of Points and Authorities, of which, pursuant to Federal Rule of Evidence 201,
7 Familiy whole respectfully requests the Court take judicial notice.

8 7. On June 6, 2008, in the related matter of *Familiy whole Inc. etc. et al. v. McKesson*
9 *Corp. etc. et al.*, United States District Court, Northern District of California Case Number CV08-
10 2850 WBD, filed on June 6, 2008 (the "Second Action") (the First Action and Second Action are
11 collectively referred to herein as the "Actions"), Familiy whole filed their Complaint for Specific
12 Performance of Contract and Accounting (the "Second Complaint"). Attached hereto as **Exhibit 6**
13 is a true and correct copy of the Second Complaint, of which, pursuant to Federal Rule of Evidence
14 201, Familiy whole respectfully requests the Court take judicial notice.

15 8. On June 12, 2008, Familiy whole requested McKesson stipulate to the First Action
16 being designated as related to the Second Action. McKesson would not stipulate. Accordingly, on
17 June 16, 2008, Familiy whole filed its Administrative Motion to Consider Whether Cases Should be
18 Related (the "Administrative Motion"). On June 18, 2008, McKesson filed its opposition to
19 Familiy whole's Administrative Motion. On June 19, 2008, the Court entered its order granting
20 Familiy whole's Administrative Motion, thereby designating the Actions as related and re-assigning the
21 Second Action to Judge Brazil (the "June 19 Order"). Attached hereto as **Exhibit 7** is a true and
22 correct copy of the June 19 Order, of which, pursuant to Federal Rule of Evidence 201, Familiy whole
23 respectfully requests the Court take judicial notice.

24 9. On July 14, 2008, I left a voicemail message for Maria Pum, Counsel for McKesson,
25 requesting that McKesson stipulate to the dismissal of the Cross-Complaint without prejudice. On
26 July 15, 2008, I received from Ms. Pum an e-mail stating that McKesson would not so stipulate.
27 Attached hereto as **Exhibit 8** is a true and correct copy of Ms. Pum's July 15, 2008 e-mail.

28 10. I thereafter requested by e-mail that that McKesson stipulate to continuing the

1 hearing on the MSJ for a sufficient period of time for the Court to determine Familymeds' motion
2 for an order granting leave to dismiss the Cross-Complaint without prejudice. Ms. Pum rejected
3 that request as well, agreeing to have the motion heard concurrently with the MSJ on August 20,
4 2008. Attached hereto as **Exhibit 9** is a true and correct copy of this e-mail correspondence chain
5 between Ms. Pum and myself.

6

7 I declare under penalty of perjury that the foregoing is true and correct.

8 Executed on July 16, 2008

/s/ Matthew S. Kenefick
MATTHEW S. KENEFICK, Declarant

JMBM | Jeffer Mangels
Butler & Marmaro LLP